

The Honorable BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMEENJOHN STANIKZY, individually and as the
representative of all persons similarly situated,

Plaintiff,

vs.

PROGRESSIVE DIRECT INSURANCE
COMPANY,

Defendant.

NO. 2:20-CV-00118 BJR

MOTION FOR AWARD OF
ATTORNEY'S FEES/COSTS &
CLASS REPRESENTATIVE
INCENTIVE AWARDS

I. MOTION/RELIEF REQUESTED

COME NOW AMEENJOHN STANIKZY, NIKLAS STEIDL, and JON MACKAY, and
submit the following unopposed motion, prior to the Final Approval Hearing, and consistent with
the Settlement Agreement preliminarily approved by the Court on November 12, 2021 (Dkt.
#67) which requests the following relief:

- a) An award of attorneys' fees in the amount of \$4,999,460.96 (26% of the fund);
- b) An award of costs in the amount of \$24,366.00; and
- c) An award of \$10,000.00 each to MR. STANIKZY, MR. STEIDL, and MR. MACKAY as incentive payments.

While the approval of the motion will not be considered until the Final Approval hearing date, settlement Class Counsel believe that best practice is that the instant motion be of record

1 prior to the March 16, 2022 deadline for objections to the proposed settlement. Progressive does
 2 not oppose the relief requested in this motion as it is consistent with the parties' Settlement
 3 Agreement (Dkt#65-1) which was preliminarily approved by the Court on November 12, 2021.
 4 As of the date of this motion, no objections have been received, nor have any class members
 5 elected to opt out from the proposed settlement.¹
 6

7 **II. PROCEDURAL AND FACTUAL BASIS FOR MOTION**

8 This matter was filed on January 24, 2020 asserting claims against Progressive for breach
 9 of contract and violations of the Washington Consumer Protection Act, WAC 284-30-391, RCW
 10 19.86 *et seq.* On February 3, 2020, Plaintiff Stanikzy filed an Amended Class Action Complaint
 11 (the "Complaint"), served upon Defendant, which is the operative Complaint in this Action.
 12 Progressive moved to dismiss, and compel appraisal, which was rejected by this Court on May
 13 29, 2020. Dkt#30.
 14

15 Subsequently, Plaintiff conducted substantial discovery of Progressive, including the
 16 production of a class list, sample of sixty (60) claims, depositions of Progressive witnesses, and
 17 the production of documents and interrogatory answers. Based upon this material, Plaintiffs
 18 moved for Class Certification on September 11, 2020. Dkt#37, 38. Progressive deposed Mr.
 19 Stanikzy, and Plaintiff's expert, and served discovery on Plaintiffs.
 20

21 On November 30, 2020 Plaintiff moved (Dkt#47) to amend the Motion for Class
 22 Certification to add Mr. Niklas Steidl and Jon Mackay as additional Class representatives. This
 23

24 ¹ Consistent with the templates created by the Federal Judicial Center, the notice mailed to all Class
 25 members discloses the fee and cost request that would be made, as well as the request for a \$10,000.00
 26 incentive payment for each Class Representative. As of the date of this motion, the report from the notice
 27 administrator, 3,319 claims have been received, with no opt-outs, and no objections.

1 motion was granted on January 4, 2021 (Dkt#49), and Progressive then deposed Mr. Steidl and
 2 Mr. Mackay.

3 Progressive subsequently filed a comprehensive Opposition to Class Certification on
 4 April 26, 2021. Dkt#'s 58, 59, 60. After this filing, the parties agreed to mediate the matter,
 5 agreeing on Judge Bruce Hilyer (Ret.) as the mediator. It was only after all key terms were
 6 agreed that the parties discussed fees, costs, and any representative bonus, and then again though
 7 and with the Mediator Judge Hilyer. After the mediation, and the key terms being reduced to
 8 writing, the parties filed a notice of Settlement with this Court on May 18, 2021 (Dkt#62) and
 9 proceeded to draft the Settlement Documents. An update on the status of preparing the
 10 settlement documents was filed on July 30, 2021. Dkt#64.

12 On November 12, 2021, this Court granted preliminary approval. The claims deadline is
 13 April 20, 2022, with the deadline to opt-out or submit objections to the settlement being March
 14 16, 2022.

15 The Settlement Agreement preliminarily approved by the Court provides in part at
 16 paragraph 51 as follows:

17 51. Attorneys' fees and costs were not fully negotiated or discussed by
 18 Class Counsel and Defendant, nor agreed upon, until all other material
 19 terms of the settlement were resolved. Class Counsel will submit their fee
 20 and cost request, and any request for service awards for the Named
 21 Plaintiffs, to the Court. Class Counsel will not ask the Court for attorneys'
 22 fees in any amount beyond 26% of the Settlement Fund and out-of-pocket
 23 costs of up to \$24,366. Class Counsel will request service awards for the
 24 Named Plaintiffs of \$10,000.00 each. Any attorneys' fees and costs, and
 25 any service awards, awarded by the Court will be paid to Class Counsel
 26 and Named Plaintiffs, respectively, no later than fourteen (14) days after
 27 the Effective Date. Such payment shall be made by a check or wire issued
 to Law Offices of Stephen M. Hansen, P.S. Trust Account, unless other
 delivery instructions are provided to Defendant's counsel in writing by
 Class Counsel no later than seven (7) days after the Effective Date.

(Dkt#65-1). The proposed incentive award to the Class Representatives, \$10,000.00 for each, is further set forth at paragraph 49 of the Stipulation of Settlement.

The relief requested in this motion follows the terms of the parties' Settlement Agreement. Notice of the attorney's fee/cost request, and the requested incentive award is detailed in Section 11 of the Court-approved Notice disseminated to the Class Members, with a copy of the Notice being on the website constructed by the Claims Administrator:

<http://www.washingtonprogressivedirecttotallossinsurancesettlement.com/>

III. ARGUMENT

A. Attorney's Fee Requests & the "Common Fund Doctrine."

Under *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 273 (1975), the common fund exception to the American Rule permits class counsel and representatives to be compensated for their efforts that create a common fund for the benefit a class of litigants. *See also Manual for Complex Litigation, Fourth*, §14.11 at 185 ("*Manual*"). The "common fund" exception "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Since the decisions in *Trustees v. Greenough*, 105 U.S. 527, 537 (1881), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 124 (1885), the courts have recognized consistently that a litigant or a lawyer whose efforts create a common fund for the benefit of persons other than himself or his/her client is entitled to a reasonable attorneys' fee, plus expenses from the fund as a whole. *Boeing*, 444 U.S. at 478; *Mills v. Electric Auto-lite Co.*, 396 U.S. 375, 395 (1970).

"Absent extraordinary circumstances, the unrepresented claimants should pay for the

attorneys' services in proportion to their benefit from them – that is, the unrepresented claimants should pay a percentage of the reasonable value of the attorneys' services to the class equal to their percentage of the class' recovery.” *Lindy Bros Builders, Inc., v. American Radiator & Standard Sanitary Corp.* 487 F. 2d 161, 169 (3d Cir. 1973). The equitable powers of the courts over the fund created by the litigation allows a court to prevent inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. *Boeing*, 444 U.S. at 478; *Mills*, 396 U.S. at 394.

B. Washington & Ninth Circuit Case Law

Because Washington law governed Plaintiffs' substantive claims in this matter, it also governs the award of fees. *Mangold v. Calif. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (“Existing Ninth Circuit precedent has applied state law in determining not only the right to fees, but also in the method of calculating the fees” and citing to similar rulings in other circuits, holding that “calculation of the amount of the fee is bound up in the substantive state right.”). Under Washington law, the percentage-of-recovery approach, not the loadstar method, is used in calculating fees in common fund cases. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993) (holding that in a common fund case, “the size of the recovery constitutes a suitable measure of the attorney's performance”). Because the claims at issue arise under Washington Law, Plaintiff's request focuses on the “percentage of the fund” approach, which is the applicable legal rule.

Bowles states that “in common fund cases, the 'benchmark' award is 25 percent of the recovery obtained,” with 20-30% as the usual range. *Bowles*, 121 Wn.2d at 72-73. Ninth Circuit cases echo this approach. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48, 1051, n.6 (9th

1 Cir. 2002) (holding that under *Mangold*, Court would apply *Bowles*, noting that 20-30% range
2 was typical, approving 28% fee in “megafund” case).

3 Here, the size of the common fund, \$19,228,696.06, is the measure of Class Counsel’s
4 success and performance. Notably, the fee agreed to by Progressive – based upon negotiations
5 involving a well-respected and experienced mediator – is (at 26%) only one percentage point
6 above the benchmark 25% of the fund fee.
7

8 As noted commentators observe:

9 [o]ne of the primary advantages of the POR method is that it is thought to
10 equate the interests of class counsel with those of the class members and
encourage class counsel to prosecute the case in an efficient manner.

11 Heubert B. Newberg & Alba Conte, *4 Newberg on Class Actions* §14:06, at 566-67 (4th Ed.
12 2002). The Settlement clearly evidences the efficient manner in which Class Counsel brought an
13 end to this litigation, and it addresses equally both the Class’ interest in receiving an immediate
14 cash payment and Class Counsel’s interest in receiving a fee for their efforts in creating a
15 common fund. Class Counsels’ request of \$4,999,460.96 for fees (26% of the common fund)
16 and \$24,366.00 in costs is reasonable.
17

18 As stated above, the Washington Supreme Court, in *Bowles*, recognized 25% as a
19 “benchmark” for the common fund as a reasonable fee. *Bowles*, 847 P.2d. at 451. Ninth Circuit
20 authority such as the Court in *WPPSS* recognizes ranges between 20% and 40%. *See e.g. In re*
21 *Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1297. Other examples of the range of
22 fee awards include *In re Pacific Enterprises Sec. Lit.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming
23 an award equal to 33% of the common fund); *In re Activision Sec. Lit.*, 723 F.Supp. 1373, 1375
24 (N.D. Cal. 1989) (awarding 32.8%); *Dennings v. Clearwire Corp*, No. C10-1859JLR, 2013 U.S.
25
26
27

1 Dist. LEXIS 64021 (W.D. Wash. 5/3/13) (granting request for 35.78% fee).

2 ***C. The Requested Fee of 26% Is Reasonable***

3 The decision of what percentage to award in attorneys' fees in common fund cases is
 4 committed to the sound discretion of the trial court. In exercising this discretion, courts have
 5 recognized several factors that may assist in determining whether the fee requested is reasonable.
 6 Analysis of these factors, considering the Washington Supreme Court's holding in *Bowles*,
 7 provides further support that an award of \$4,999,460.96 (26% of the fund) is reasonable given
 8 the excellent result in this case for the Class. The factors to consider include: (i) the size of the
 9 fund and the number of persons who received monetary benefits; (ii) the skill and efficiency of
 10 the attorneys involved; (iii) the complexity and duration of the litigation; (iv) the risks of the
 11 non-recovery and non-payment; and (v) the presence or absence of substantial objections. *See*
 12 *Manual*, § 14:121 at 192.
 13
 14

15 ***1) The Size of the Settlement Created and the Number of Persons Benefited***

16 The common fund created by the Settlement results in a meaningful cash award to each
 17 of the Class Members who submit a valid Claim Form, equaling about 5.4% of the amount they
 18 were paid for the total loss of their vehicle, as disclosed in the settlement notice and claims form.
 19 See Dkt#65-1 at 34. The settlement affects 28,627 Class Members and has created a fund of
 20 \$19,228,696.06. This is a substantial amount and will provide substantial payments to Class
 21 members. This sum is made available via a simple claims process.
 22

23 While the payouts to Class Members who elect to participate will be significant, the
 24 amounts would still clearly be insufficient to provide the proper financial incentive for any
 25 individual class member to achieve justice in the absence of this class settlement. Both the size
 26
 27

1 of the class and the large amount of the common fund support Class Counsel's application for
 2 fees and costs.

3 ***2) The Skill and Efficiency of the Attorneys Involved***

4 Counsel who worked on this case are experienced in class action litigation generally and
 5 have decades of experience in the prosecution of consumer claims against insurers and other
 6 large corporations as well. Counsel attempted at all times to proceed in an efficient manner
 7 against skilled adversaries, resulting in a settlement while Plaintiff's Class Certification motion
 8 was pending.
 9

10 ***3) The Complexity of the Litigation***

11 Class Counsel submit that their overall approach and strategy for handling this case
 12 played a key role in producing the settlement obtained on behalf of the Class. At each stage
 13 Class Counsel gathered evidence and presented arguments necessary to advance this matter to
 14 the pending class certification motion while expending considerable sums (in excess of
 15 \$24,000.00) in out-of-pocket costs, nearly all on discovery and experts. Thus, this factor
 16 strongly supports the requested award of fees and costs.
 17

18 ***4) The Risk of Non-Payment***

19 Class Counsel can personally attest that the risk of non-payment in class action litigation
 20 is substantial. Class Counsel knows all too well the risk of non-payment having had class
 21 certification denied – after the expenditure of substantial time and money – in numerous Class
 22 Actions cases challenging insurance claims practices. Despite this, Class Counsel undertook the
 23 responsibility for an expert and discovery-heavy class action involving an out-of-state corporate
 24 defendant financially capable of fully litigating this matter through trial and subsequent appeals.
 25
 26
 27

1 Class Counsel were likewise prepared to invest their time and financial resources to litigate this
2 matter through trial (and any subsequent appeals) with the end results was far from certain.²

3 As the Ninth Circuit has observed, “[c]ontingent fees that may far exceed the market
4 value of these services, if rendered on a non-contingent basis are acceptable in the legal
5 profession as a legitimate way of assuring competent representation for plaintiffs who could not
6 afford to pay on an hourly basis, regardless whether they win or lose.” *In re Washington Pub.*
7 *Power Supply Sys. Secs. Litig.*, 19 F.3d at 1299. Here a 25% benchmark fee includes no such
8 premium, let alone “far exceeding” a typical fee.

10 ***5) The Presence or Absence of Substantial Objections***

11 Through the Individual Notice, Class Members have been specifically advised that Class
12 Counsel intended to request an award of fees of up to 26% of the common fund, together with
13 costs, and as of the date of this filing there have been no objections and no exclusions, with to
14 date 3,319 claims having been received. Plaintiff’s Counsel will update this factor if needed.

16 ***D. Incurred costs should be awarded***

17 Class Counsel advanced hard costs have totaling \$24,366.00. These include expert
18 witness and mediation fees and the original filing and service of process fees. This figure was
19 also disclosed in the notice, agreed to by Progressive, and no objection has been received.

21 ***E. Incentive Awards to the Class Representatives are Proper***

22 The Settlement Agreement provides that Defendant will pay the class representatives Mr.
23 Stanikzy, Mr. Steidl, and Mr. Mackay the sum of \$10,000.00 each and the notice informed Class

24 ² Plaintiffs note as an example of this, a similar case (challenging a “Typical Negotiation”
25 deduction), now pending before Judge Pechman, *Ngethpharat v. State Farm Mut. Auto Ins. Co.* No. 20-cv-
26 545-MJP (W.D. Wa), which is currently set for trial on June 8, 2022 – having been certified by Judge
27 Pechman, with review denied by the 9th Circuit – and to date filled 189 docket entries.

1 Members of this request. Class Counsel respectfully request that the Court approve this modest
 2 incentive payments to each class representative.

3 The granting of an incentive award to a class representative lies within the Court's sound
 4 discretion. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). The
 5 size of an incentive award depends on several factors, including the amount of risks to the class
 6 representative, both financial and otherwise, in becoming and continuing as a litigant; the time
 7 and effort expended by the representative in assisting in the prosecution of the litigation or in
 8 bringing to bear added value; and any other burden sustained by the representative in lending
 9 himself to prosecute an ultimate recovery of those claims. *See, e.g., Roberts v. Texaco, Inc.*, 979
 10 F. Supp. 185, 199 (S.D.N.Y. 1997); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493 (N.D. Miss.
 11 1996); *Spicer v. Chicago Bd. Options Exch. Inc.*, 844 F. Supp. 1226, 1266 (N.D. Ill. 1993). The
 12 requested incentive award is well within the range of reasonableness.
 13
 14

15 IV. CONCLUSION

16 For the foregoing reasons, Class Counsel, on behalf of the Class Representatives and
 17 Class Members, respectfully request the Court to

- 18 a) AWARD an award of attorneys' fees and costs in the amount of
- 19 \$4,999,460.96 (26% of the fund);
- 20 b) AWARD costs of \$24,366.00; and
- 21 c) AWARD MR. STANIKZY, MR. STEIDL, and MR. MACKAY the sum

1 of \$10,000.00 each as incentive payments.

2 RESPECTFULLY SUBMITTED this 1st day of March, 2022.

3 Law Offices of STEPHEN M. HANSEN, PS

4 

5 STEPHEN M. HANSEN, WSBA # 15642
6 Of Counsel for Settlement Class

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 1st day of March, 2022, I electronically filed the above and foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all counsel of record.

DATED this 1st day of March, 2022, at Tacoma, Washington.



SARA B. WALKER, Legal Assistant